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The Cross-Conditionality Phenomenon—Some Legal Aspects

Under article X of its Articles of Agreement the International Monetary Fund has the authority to "cooperate within the terms of its Articles with any general international organization and with public international organizations having specialized responsibilities in related fields." In accordance with this provision, the Fund has been cooperating with a number of international organizations, including the World Bank and the regional Development Banks.[1]

Historically the Fund has a particularly close relationship with the World Bank, and cooperation between the Fund and the Bank has intensified in recent years. Recently the Fund and the Bank have developed mechanisms of collaboration between their staffs to assist low income countries to develop a medium-term economic framework.[2] Whether we are witnessing a cross-conditionality phenomenon in this cooperation is the subject matter of this article.[3]

Fifteen years ago, the division of labor between the World Bank and the International Monetary Fund seemed straightforward. The Fund was responsible for short-term stabilization that concentrated on monetary variables and demand management, while the Bank was responsible for longer-term perspectives, and was oriented towards increasing supply-side efficiency and stimulating productive investment. While there was always some interdependence among these areas—the Fund's interest in providing immediate balance of payments financial assistance, and the Bank's interest in providing

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1. A description of the type of cooperation entertained by the Fund with other international organizations appears in the Annual Reports of the Fund.

2. Programs formulated within this framework are supported by loans from the Fund and the Bank.

3. *See also* art. X [Articles of Agreement], which reads as follows: "The Fund shall cooperate within the terms of this Agreement with any general international organization and with public international organizations having specialized responsibilities in related fields. . . ."

lending for discrete projects—their respective staffs achieved their targets with only occasional interaction.

Enhanced collaboration is clearly justified in the two institutions' Articles of Agreement. Cooperation with other international organizations is provided for in article X of the Fund's Articles of Agreement and in article V, section 8(a) of the World Bank's articles. Cooperation is envisaged both with "any general international organization" and with "public international organizations having specialized responsibilities in related fields." In the case of the Bank there is an additional provision that has no counterpart in the IMF articles. Paragraph 8(b) of the World Bank's articles provides that "in making decisions on applications for loans or guarantees relating to matters directly within the competence of any international organization of the types specified in the preceding paragraph and participated in primarily by members of the Bank, the Bank shall give consideration to the views and recommendations of such organizations."

Two points must be taken into consideration here. The first is that while the World Bank is clearly required to "give consideration to the views and recommendations of the IMF," there is no comparable obligation on the IMF under its articles. The second is that the Bank is not required, under article V, section 8(b), to do more than "give consideration" to the views and recommendations of the IMF. The Bank is certainly not bound by anything the Fund may say or do.[4]

I. The Issue

The meaning of the word "conditionality" in the context of the IMF and, more recently, the World Bank, is well known to those working in these two institutions. Gold states that the word "conditionality" in the International Monetary Fund refers to the policies the Fund expects a member to follow in order to be entitled to the use of its resources.[5] A similar interpretation could trace the essence of the World Bank's conditionality to policy-based operations.

It appears that a formal definition of cross-conditionality has not yet been established. Sidney Dell, acknowledging this fact, has suggested the following four examples of "official" cross-conditionality.[6] He states that formal cross-conditionality arises or might arise:

> (i) If either of the Bretton Woods institutions exercised, or sought to exercise, a veto over a loan under consideration by the other or over a drawing against an existing loan;
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> (ii) if there were a formal understanding between the two institutions that neither would make a loan to or an arrangement (the term "arrangement" here refers to an IMF stand-by arrangement) with any member country, or with a particular member country, except with the concurrence of the other institution;

4. *Id.*
5. J. GOLD, CONDITIONALITY 1 (IMF Pamphlet Series No. 31, 1979).
6. S. Dell, The Question of Cross-Conditionality 6 (June 1986) (unpublished paper).

(iii) if there were a formal understanding between the two institutions that neither would allow member countries, or a particular member country, continued access to a previously agreed loan or arrangement, except with the concurrence of the other institution;

(iv) if a formal action, notably a declaration of ineligibility by the Fund were, by previous arrangement between the two institutions, to interrupt access to a Bank loan.

Informal cross-conditionality could thus be considered in terms of circumstances in which, although there was no formal arrangement or understanding between the two institutions, the same outcome occurred through the actions and decisions of each organization acting individually and independently.[7]

The most common example of collaboration that cannot be considered as cross-conditionality *stricto sensu,* is the close interrelatedness between the World Bank and the Fund as far as consultative procedures towards final decision making is concerned. This type of informal cooperation could be contemplated as indirect informal consultative cross-conditionality.[8] In this case the behavior of both international institutions cannot be regarded as being inconsistent with their Articles of Agreement.

Another example of collaboration that falls into the sphere of informal indirect cross-conditionality is the attempt of both institutions to provide a similar package of conditionality, in other words, a kind of uniformity of advice to the country seeking financial assistance. This could be termed as interdependent indirect informal economic cross-conditionality.

The third type of informal indirect cross-conditionality could be termed "informal indirect financial cross-conditionality." This type of informal cross-conditionality can be understood not as the relationship involving the two international financial institutions but as a relationship in a wider area, including the commercial banks, regional development banks, and other bilateral and multilateral, official and private lenders. In other words, it could be interpreted as involving the spectrum of the World Bank Structural Adjustment Loans, the rescheduling of official bilateral loans through the Paris Club, the rescheduling and new loans from the private banking system, and IMF stand-by or extended arrangements.

Indirect informal financial cross-conditionality is the most important type of informal cross-conditionality. Indirect informal financial cross-conditionality raises the issue of the "multiplier" effect that a denial of either a Structural Adjustment Loan from the Bank, or a stand-by or similar arrangement from the Fund, could have on the decisions of other lenders. It demonstrates the catalytic effect these agencies have assumed in influencing flows from commercial banks, export credit agencies, and bilateral donors to countries that undertake adjustment programs.

7. *See* Feinberg, *The Changing Relationship Between the World Bank and the International Monetary Fund,* 42 INT'L ORG. 545–60 (1988).

8. *Id.*

Take, for instance, the case where commercial bank loans are conditioned on the borrower's ability to draw under a stand-by or similar arrangement from the Fund. If the Fund declares that the member is not in compliance with its instructions, then banks may withdraw their lending operations from the country. The loss of important commercial bank credits could undermine the borrower's creditworthiness, and subsequently destroy or at least diminish its capacity to proceed with an application for a policy-based World Bank loan. Or take the case where the commercial banks enter into parallel or co-financing arrangements, and condition their loans on the World Bank's approval of a sector loan. A negative answer from the World Bank could affect the decision of commercial banks to proceed with their credits and, subsequently, could affect the borrower's standing before international financial markets. It could affect also the member's credit policies and exchange reserves, and ultimately could influence negatively the Fund's willingness to continue to support the member's program.[9]

In practice formal cross-conditionality has been very rarely applied. As far as this author knows, only one case[10] involving explicit cross-conditionality has ever come before either of the Executive Boards. Nevertheless, implicit cross-conditionality is a real problem. Loans conditioned by both Bretton Woods institutions are not presented to the respective Executive Boards for consideration or decision until compliance with the requisite cross-conditional clauses has been secured. The Executive Boards are thus not made officially aware of the existence of any cross-conditions. Cross-conditionality, consequently, does not manifest itself in any overt way.

II. Legal Issues Arising from "Informal" Cross-Conditionality—*Ultra Vires*

In practice, cross-conditionality could be construed as the phenomenon whereby acceptance by the borrowing country of the conditions of one financial agency is made a *precondition* for financial support by the others. These are recognized but unwritten conventions, such as the requirement that a country applying for a World Bank Structural Adjustment Loan has previously undertaken an IMF program. The legal issues arising from these unwritten conventions constitute the subject matter of this section.

9. *See* A. F. Mohammed, *The Role of the Fund and the World Bank in Adjustment and Development*, in ADJUSTMENT POLICIES AND DEVELOPMENT STRATEGIES IN THE ARAB WORLD 84–85 (S. El-Naggar ed.).

10. The loan agreement of the World Bank with Jamaica, approved December 13, 1977, included a specific provision tying the World Bank's disbursements to the ability of Jamaica to purchase stated amounts under stand-by arrangements with the IMF. Loan Agreement (Program Loan) between Jamaica and the IBRD, Loan No. 1500 JM, Dec. 16, 1977 (Schedule 1 para. 2(b), (c)).

A. Cases of Cross-Conditionality[11]

Because of the circumstances in which cross-conditionality is believed to occur, and the fact that generally no objective evidence can be provided of its occurrence, it is not possible to document specific cases. For this reason, the cases that are set out below are given in hypothetical terms.

Case 1

Country *A* makes a successful approach to the IMF for the establishment of a program under the Extended Fund Facility (EFF) designed to relieve pressure on the balance of payments. This is to be achieved through a program of public investment, especially in the energy and transport sectors. When the program is presented to the Executive Board of the IMF, it is reported by the Fund staff that the World Bank fully endorses the structural changes envisaged under the program. No difficulty arises in this case because World Bank endorsement of the structural changes in question antedates the EFF negotiations with the Fund, so that those negotiations are not held up in any way. The question raised by this case is what would happen (a) if World Bank approval has not been given at the appropriate time, and (b) if the World Bank has denied its approval.

Case 2

A petition for an industrial sector loan for Country *B* is examined in the Bank's loan committee with the endorsement of the regional department of the Fund. However, the loan is not granted because of the Fund's disapproval of the economic policy pursued by Country *B*, especially in the sector of exchange rate policy and trade restrictions policy. The loan finally is not granted because Country *B* fails to conform its policies to the IMF's desires on this point.

Case 3

Drawings on an Extended Fund Facility loan by Country *C* are suspended by the Fund because the member country fails to confine its economic policy to the standardized performance requirements of the Fund's arrangement. This leads to the World Bank's withdrawing its money from Country *C* by suspending the second drawing on a Structural Adjustment Loan, and subsequently, to the suspension of a rescheduling operation by the Paris Club.

Case 4

A World Bank loan for the backup of agricultural policies of Country *D* is denied because the Fund does not reach an agreement with Country *D* on a stand-by arrangement. Country *D* does not accept the Fund's "admonitions" or certain aspects of its exchange rate policy. In this case the Fund has exercised a de facto and not de jure veto on the World Bank's lending operations.

11. S. Dell, *supra* note 6.

Case 5

A World Bank loan to finance emergency imports for Country *E* to replenish its severely depleted stocks of certain essential items is denied because Country *E* does not reach an agreement with the Fund on a program of adjustment.

Case 6

The staff of the World Bank has reached the conclusion that Country *F* has adopted an economic program that is considered in accordance with the World Bank's criteria as sufficient to justify a Structural Adjustment Loan. The Fund, on the other hand, puts forward some difficulties in considering whether the country's economic policies are appropriate enough so as to be entitled to make use of the Fund's resources. The Fund urges Country *F* to adopt stricter policies in its exchange rate policy program. The World Bank loan is denied. Finally, Country *F* accepts the Fund's "admonitions," implements more stringent policies and reaches an agreement under a stand-by arrangement. The World Bank loan immediately is approved and released.

Case 7

In this case, the World Bank staff manages to convince the Fund staff that its "admonitions" were unnecessarily severe, and the Fund staff agrees to ease the conditions accordingly.

Case 8

A Fund-supported program in Country *X* includes specific measures for a liberalization of import restrictions. A Bank industrial and trade policy loan to the same country, negotiated soon after the arrangement with the Fund, demands a reduction of import duties to a lower level than the effective rate of protection. The revenue implications of this measure are inconsistent with the budgetary targets in the Fund-supported program. Consultations with the Fund result in a modification of those targets so that the country is able to conclude an agreement with the Bank in accordance with its program measures. But the Bank's measures are designed to obtain an exchange rate that is different from the one implied in the Fund-supported program. Since this program has already been negotiated, the Bank amends its program to conform to the Fund's exchange rate targets.

B. The Nature of "Informal" Cross-Conditionality

The crux of the issue is to be detected through the role that a stand-by or similar arrangement plays in the lending procedure with the World Bank. Richard Edwards states:[12]

> On a few occasions the World Bank has conditioned its lending on the conclusion by the borrower of a stand-by or Extended Arrangement with the IMF. When this has been the case, the condition was usually satisfied before the loan was approved by the Executive Directors of the bank, and thus, no specific covenant appeared in the loan or guarantee agreement.

12. R. Edwards, International Monetary Collaboration 272–73.

Thus, a stand-by or similar arrangement does not act as a condition in the loan agreement but as a precondition. No specific clause has to be included in the loan or guarantee agreement. The same analogy can be found in the preconditions set by the Fund.[13] The preconditions laid down by a Fund mission must be executed before an agreement is presented for approval by the Executive Board.

The issue that arises is whether the World Bank is entitled to demand, as a precondition for access to its resources, an economic program supported and approved by the Fund under a stand-by arrangement scheme and vice versa.[14] In other words, does the Bank's right to demand an IMF stand-by or similar arrangement as a precondition for the grant of a loan derive from an *intra vires* power, or does it constitute an act *ultra vires* to its Articles of Agreement? The same issue must be considered for the case where the Bank's approval of a request acts as a precondition for the release of the Fund's resources.[15] (Case 1).

C. Legal Analysis

It is generally accepted that the doctrine of *ultra vires* applies in the context of international organizations. That this doctrine applies also in our case is clear.[16]

Let me take Case 1 and analyze whether the Fund staff acts *ultra vires* to its Articles of Agreement. In the case of the IMF Ebere O. Osieke states:

> The fact which emerges from the foregoing examination is that it may be possible to claim that the acts of an organ of the Fund are unconstitutional, on the grounds that the Fund has no competence to deal with the questions dealt with by the organ, or that the organ has acted in a manner contrary to the express provisions of the Articles of Agreement.[17]

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13. *See infra* section III.A.2.

14. That is to say, whether the Fund is entitled to demand as a precondition for access to its resources, a development program supported and approved by the bank under either a development (project) loan or a structural adjustment loan.

15. *See* Gold, *(. . . To Contribute Thereby To . . . Development . . .): Aspects of the Relations of the International Monetary Fund with Its Developing Members,* 10 COLUM. J. TRANSNAT'L L. 267, 292 (1979); *see also* Wohlmuth, *IMF and World Bank Conditionality,* 16 DEV. & PEACE 43 (Autumn 1985).

16. For a general view of the doctrine of *ultra vires,* see D. CIOBANU, PRELIMINARY OBJECTIONS: RELATED TO THE JURISDICTION OF THE UNITED NATIONALS POLITICAL ORGANS (1975); C. LEBEN, LES SANCTIONS PRIVATIVES DE DROITS OU DE QUALITÉ DANS LES ORGANISATIONS INTERNATIONALES SPÉCIALISÉES (1979); Cahier, *La Nullité en droit international,* 76 REV. GÉNÉRALE DROIT INT'L PUBLIC 645 (1972); Jennings, *Nullity and Effectiveness in International Law,* in CAMBRIDGE ESSAYS IN INTERNATIONAL LAW 64 (1965); Lauterpacht, *The Legal Effect of Illegal Acts of International Organizations,* in CAMBRIDGE ESSAYS IN INTERNATIONAL LAW 88 (1965); Morgenstern, *Legality in International Organizations,* 48 BRIT. Y.B. INT'L L. 241 (1976–77); Osieke, *Admission to Membership in International Organizations: The Case of Namibia,* 51 BRIT. Y.B. INT'L L. 189, 220 (1980); Osieke, *The Legal Validity of Ultra Vires Decisions of International Organizations,* 77 AM. J. INT'L L. 239 (1983) [hereinafter Osieke, *Legal Validity*]; Osieke, *Ultra Vires' Acts in International Organizations—The Experience of the International Labour Organization,* 48 BRIT. Y.B. INT'L L. 259 (1976–77); Osieke, *Unconstitutional Acts in International Organisations: The Law and Practice of the ICAO,* 28 INT'L & COMP. L.Q. 1 (1979).

17. Ebere O. Osieke, The Constitutional Character of International Organizations with Particular Reference to the I.L.O., I.C.A.O. and IMF (April 1974) (London University Ph.D. thesis unpublished).

In Case 1 the Bank's approval acts as a precondition for the Fund's acquiescence in a member's petition for a drawing. The possibility arises for the member to challenge the demand and to refuse to comply with informal cross-conditional clauses on the ground that this act is *ultra vires* to the Fund's Articles of Agreement. The doctrine of *ultra vires* could be applied at this stage because the Fund's demand constitutes a "Decision" of the Fund.[18] It is also an act of an organ of the Fund; in our case, the organ could be either the Managing Director or the Executive Directors.[19]

In general, if a precondition emanates from the wrong organ or the manner in which it is formulated is contrary to the express provisions of the Articles of Agreement, then the matter has to be submitted to the Executive Directors or the Board of Governors for a decision, or a request may be made to an organ of the Fund for an Advisory Opinion from the International Court of Justice.[20]

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18. Unambiguously, preconditions are "binding" decisions of the Fund, imposed on the member, through the doctrine of estoppel, through the general principle of good faith, and on the basis of a binding unilateral declaration. For the doctrine of estoppel see generally, B. CHENG, GENERAL PRINCIPLES OF LAW ch. 5; D.W, GREIG, INTERNATIONAL LAW 34–38, 452 (2d ed. 1976); 1 G. SCHWARZENBERGER, INTERNATIONAL LAW (3d ed.); MacGibbon, *Estoppel in International Law*, 7 INT'L & COMP. L.Q. 468 (1958). For the theory of binding unilateral declaration, see Nuclear Tests Case (Austl. v. Fr.), 1974 I.C.J. 267 (Judgment of Dec. 20); Carbone, *Promise in International Law: A Confirmation of its Binding Force*, 1 ITAL. Y.B. INT'L L.166 (1975); Frank, *Word Made Law: The Decision of the ICJ in the Nuclear Test Cases*, 69 AM. J. INT'L L. 612 (1975); Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AM. J. INT'L L. 1 (1977); Sicault, *Du Caractére Obligatoire Des Engagements Unilateraux En Droit International Public*, 83 REV. GÉNÉRALE DROIT INT'L PUBLIC 634 (1979).

19. *See* Ebere O. Osieke, *supra* note 17. He states, *inter alia*:

> A claim that the Managing Director or the Executive Directors have acted in a manner contrary to the express provisions of the Articles of Agreement will, if disputed by the organs concerned, amount to a question of interpretation between the member concerned and the Fund. In such a case the claim will be decided by the Executive Directors in accordance with the provisions of article XVIII, and their decision may be appealed against to the Board of Governors. . . . If the claim does not amount to a question of interpretation, it may be made to the organs concerned in the first instance, but may also be submitted to a superior organ for decision. This means that a claim that acts adopted by the Managing Director are unconstitutional may be submitted to the Executive Directors for decision, and a claim that the acts of the Executive Directors are unconstitutional may be submitted to the Board of Governors for decision.

20. *See* Agreement Between the U.N. and the IMF, art. VIII (1947); *see also* Ebere O. Osieke, *supra* note 17. He states:

> [I]t may be possible to claim that the acts of an organ of the Fund are unconstitutional, on the grounds that the Fund has no competence to deal with the question dealt with by the organ, or that the organ has acted in a manner contrary to the express provisions of the Articles of Agreement.
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> . . . . Any member may ask the organs of the Fund to submit a request to the International Court of Justice for an Advisory Opinion as to whether the acts complained of are valid. However, the organs are not under an obligation to submit such a request, and even if they do so, they are not under an obligation to accept the opinion given by the court.

The precondition is set by the Fund, particularly by the Managing Director, who is, essentially, involved with the formulation of preconditions. Despite the fact that the precondition emanates primarily from the Managing Director, however, it is the Executive Board that is the decision-making organ ultimately responsible for the preconditions. The formal nature of the preconditions arises in two ways. First, the Executive Directors, and therefore the Board, as a superior organ to the Managing Director, have a decisive say in the matter of the preconditions, at the "prerecommendation" stage. Second, when the Managing Director recommends a member's request to the Executive Board, the Executive Board, in approving the request, "makes" the precondition in a retrospective sense with its formal seal of approval of a decision, although the precondition is not included in the loan agreement. The Executive Board has notice of the preconditions and it is the organ that decides on the matter; the Managing Director is merely an instrument, a delegate of the Board, in this respect. Thus, the precondition in our case is a decision of the Executive Board, directed at the requesting member.

D. The Perspective

1. *The IMF*

The question of *ultra vires* is one of interpretation. Gold has asserted that the Fund has implied authority to interpret its own decisions, derived from its express authority to interpret the Articles of Agreement.[21] Therefore, the matter could be raised, in the first instance, with the Executive Board, with the possibility of appeal to the Board of Governors. The decision of the Board of Governors is final.[22]

The application of the doctrine of *ultra vires* to the Fund is quite limited. The objectives and policies that are included either in a Letter of Intent or in a stand-by document are primarily derived from the economic background. The Fund, thus, has a considerable latitude in its operations.

The "balance of payments problems" in article V involve not just a balance of payments disequilibrium per se, but also other "equilibrium objectives" of an economic character, such as inflation, unemployment, trade restriction, etc.[23] Performance criteria, for instance, do not relate strictly to a balance of payments

21. J. Gold, The Legal Character of the Fund's Stand-by Arrangements and Why It Matters 40 (IMF Pamphlet Series No. 35, 1980).

22. Articles of Agreement, art. XXIX; *see also* Osieke, *Legal Validity, supra* note 16, at 239.

23. A particular example is the prohibition of restrictions on trade, increasingly formulated as a performance criterion. The inclusion of this prohibition as a performance criterion constitutes an intrusion in the economic field of activity not strictly supervised by the Fund but rather under GATT. *See* J. Gold, *supra* note 21, at 10. Nevertheless, it constitutes an "equilibrium objective," and it aims at the furtherance of the purposes of the Fund as stated in art. I. Furthermore, the Executive Directors have called upon the members to collaborate with the Fund in avoiding the escalation of restrictions on trade. *See* Decision No. 4134-(74/4), 1974; Decision No. 4232-(74/67).

disequilibrium, *stricto sensu,* but are connected more with equilibrium objectives. Some of these performance criteria are general obligations, expressly imposed by the Articles of Agreement.[24] On the other hand, there are performance criteria that are not expressly stated in the Articles of Agreement, but are, simply, implied by these Articles. Thus, the measure of their propriety and, subsequently, the measure of validity of the application of the doctrine of *ultra vires* in this context, will not depend on an examination of the balance of payments objectives, but will be regulated through other generally confined considerations implied and concluded in the Articles of Agreement.

The Fund is directed, through its law, to conduct operations based on its aim, as has been stated in article I. The purposes incorporated in this article are of wide scope. They embrace a variety of economic objectives and are all subject to a number of interpretations. The International Court of Justice Decision in the *Expense Case,*[25] applied in this context, supports the argument that any action taken in order to fulfill one of the stated purposes in article I, even indirectly, cannot be considered as an *ultra vires* act to the Articles of Agreement.

Furthermore, article I is neither exhaustive nor exclusive. The Fund, in formulating its policies under article V, has to take into account the provisions of the Articles of Agreement generally.[26] Thus it becomes evident that the Fund, in order to fulfill the purposes set out in article I, can consider a very large range of economic objectives to formulate its policies. In light of this reasoning, it seems quite difficult to argue that the Fund in Case 1 acts *ultra vires* to the Articles of Agreement. As long as there is a balance of payments problem and the objectives and policies are orientated towards the alleviation of this, objectives found in the Articles of Agreement, or implied by them, may be considered.

Thus, the Articles of Agreement do provide a basis for action for objectives such as curbing inflation or development, even if they do not fall into the sphere of the payments situation of the member. As long as there is a balance of payments problem and the program is orientated towards this problem, these lateral objectives either in the form of a precondition or in the form of a performance criterion, are justified on the grounds that they constitute decisive factors for the success of the economic program. Thus, the precondition in our case can be contemplated as an *intra vires* act of the Fund, as long as it is subordinate to the main object.

The other argument supporting the view that the *ultra vires* doctrine has a limited scope of operation in practice is based on article X of the Fund's Articles

24. For instance, restrictions on payments for current transactions under the Fund's Articles of Agreement, art. VIII, sec. 2.

25. Expense Case, 1962 I.C.J. 168.

26. For instance, the Fund's Articles of Agreement, art. IV, sec. 1, invites the member state to consider objectives and policies of a panoramic scope.

of Agreement. Article V, section 8, of the World Bank's Articles of Agreement contains identical wording directing each agency to "cooperate within the terms of the Agreement with any general international organization and with public international organizations having specialized responsibilities in related fields."

A final reason, which reduces the possibility of the doctrine of *ultra vires* being applied in Case 1, is the argument given by Henry Schermers. He states, in the context of the World Bank:

> An organization entering into an agreement which violates its constitution would act ultra vires. In the case of the Bank, however, a presumption of validity may be made as the organ competent to interpret its constitution (the E.D.) must approve all loan agreements. Approval of the agreement implied the interpretation that the constitution is not violated.[27]

In the case of the IMF, the Executive Board is the organ that decides whether or not to grant the request. It is also the organ responsible for "any question of interpretation of the Articles of Agreement"—subject to an appeal to the Board of Governors.[28] Thus, the *ultra vires* doctrine could, ultimately, be rejected on the above reasoning.

2. *The World Bank*

The Commonwealth report "Towards a New Bretton Woods"[29] argued that

> the important distinction between the World Bank as a development agency and the IMF as a provider of short- and medium-term balance of payments finance should not be allowed to obscure the fact that the policies cannot readily be compartmentalized into those serving the process of adjustment as distinct from those promoting growth.[30]

It recognized the need for "both institutions to assume a joint responsibility for the relevant adjustment programs."[31]

In the case of a Structural Adjustment Loan from the Bank, two aspects are central to the point under examination. The first is the unwritten convention that says that, before a country approaches the Bank, it has to have previously entered into a stand-by arrangement with the Fund. The second aspect explains the first and constitutes the rationale upon which one could argue that the precondition in Case 3 must not be considered as an *ultra vires* act to the Bank's Articles of Agreement. The rationale is that the close coordination between these two institutions was produced by the nature of the policy reform areas that constitute the main concern of the Bank's programs. Of the first dozen Structural Adjustment Loans supported by the Bank, several were explicitly directed

27. 2 H. SCHERMERS, INTERNATIONAL INSTITUTIONAL LAW 896 (1972).

28. The Fund's Articles of Agreement, art. XXIX.

29. Commonwealth Study Group, Towards a New Bretton Woods: Challenge for the World Financial and Trading System (unpublished report), (study group headed by Prof. Gerry Helleiner of the University of Toronto, Commonwealth Secretariat, 1983).

30. *Id.* para. 4.53.

31. *Id.* para. 4.56.

towards balance of payments policy issues, including debt management (eight), import policy (four), export policy (ten), and the exchange rate (two). A concern for better public sector management led to a direct involvement with budgetary questions (seven cases) and monetary policy/interest rates (five), and thus with an area that traditionally was subordinate to the Fund's control.

In other words, development and growth as goals, included in article I of the Bank's Articles of Agreement, involve not just development problems, but also broader areas of "equilibrium objectives"[32] that are necessary for the success of an economic program. Moreover, the Bank is guided in all its policies and decisions by the purposes set out in article I. These purposes contain a large area of objectives that do not fall necessarily into the sphere of development objectives per se, and these objectives are subject to various interpretations. Article I is not an exclusive list of the Bank's objectives and policies. Furthermore, the Bank in formulating its policies must have regard to the provisions of the Articles of Agreement generally.[33] The Bank's Articles of Agreement impose a host of considerations upon a Member State that it has to take into account in formulating its policies.

Thus, it is evident that the Bank possesses a whole breadth of economic objectives for which it can formulate policies. In Case 3, in light of the above reasoning, it is difficult to maintain an argument of *ultra vires*. The precondition of a stand-by arrangement from the Fund acts as a lateral economic objective that is unambiguously consonant with the development purposes set in article I. The precondition does not fall directly into the sphere of a development program, but it could be contemplated as subordinate to the main object of development. In addition, the difficulty, in practice, in isolating and identifying with precision objectives and policies, in apportioning their contribution or lack of contribution to the development purposes, poses severe difficulties for legal argumentation.

The fact that the precondition is interpreted as a corrective measure aimed at the balance of payments problem does not alter the validity of the argument. A stand-by arrangement with the Fund is considered as a *necessary* corrective measure to enable the member to adopt and carry out its program under a Structural Adjustment Loan. This precondition may be motivated not so much as to enable the implementation of the program as a whole under a Structural Adjustment Loan, but rather to assure the successful implementation of the program. The precondition acts as an adequate safeguard to prevent the improper use of the Bank's resources. A stand-by arrangement does not prevent the implementation of a program under a Structural Adjustment Loan; on the contrary, it facilitates the implementation. Nothing in the Bank's Articles of Agreement suggests the impropriety of the application of this type of precondi-

32. *E.g.*, inflation, trade restriction, balanced growth of international trade, maintenance of equilibrium in the external payments.

33. *See, e.g.*, The Bank's Articles of Agreement, art. II, sec. 1.

tion. A letter of development policies, which is equivalent to a Letter of Intent, contains references to corrective measures that are similar to those found in the Letter of Intent.[34] Thus, the precondition constitutes an extension of World Bank conditionality and could be regarded as a weak type of World Bank conditionality. The member country's chances of invalidating an act of the Bank on the ground that it is *ultra vires* to the Articles of Agreement seems to be quite limited.

III. Legal Issues Arising from "Informal" Cross-Conditionality—The Doctrine of Estoppel

Since the doctrine of *ultra vires* is of no great importance in the context of preconditions, the legal character of preconditions—whether they constitute "binding decisions"—requires investigation, since informal cross-conditional clauses are in frequent use.

It is clear that in order to have access to the Bank's resources under a Structural Adjustment Loan, the member country has to have submitted a "Letter of Development Policies" in which it describes the economic program it will pursue. Richard Edwards, states, inter alia:[35]

> The World Bank and the Fund, although they cooperate, apply their own criteria in appraising requests for assistance. On occasion the World Bank has indicated its desire that a prospective borrowing country accept the self-imposed discipline associated with an IMF stand-by or extended arrangement. On other occasions, without requiring an IMF arrangement, the World Bank has borrowed the Fund's technique of requiring a Letter of Intent, stating economic policies from the country's Finance Minister.

The Letter of Development Policies, which is similar to the Letter of Intent, submitted by the member country to the Fund, is explicitly referred to in the loan agreement. In this letter, the specific economic development policies to be pursued are spelled out in detail.[36] That the member country has to initiate the procedure for a loan from the Bank is clear. The first stage of the negotiation for a loan agreement is the preliminary talks that have to be undertaken on the initiative of the government requesting a drawing. These talks will be followed by the submission of an official letter, which spells out the willingness of the member to implement an economic development program in order to qualify as

34. *See generally* M. GUITIAN, FUND CONDITIONALITY: EVOLUTION OF PRINCIPLES AND PRACTICES (IMF Pamphlet Series); *Adjustment and Growth: How the Fund and Bank are Responding to Current Difficulties*, FIN. & DEV., June 20, 1983, at 13; Rice, *Maintaining Financing for Adjustment and Development*, FIN. & DEV., Dec. 20, 1983, at 44; *see also A Role of the IMF in Economic Development*, BANCA NAZIONALE DEL LAVORO Q. R., Dec. 1982; *Managing Director Related Fund's Long-Term Goals to Development Strategy*, 8 IMF SURV. 117, 125 (Apr. 23, 1979) [hereinafter *Managing Director*].

35. R. EDWARDS, *supra* note 12.

36. E. Stern, *World Bank Financing of Structural Adjustment*, in IMF CONDITIONALITY 87, 99 (J. Williamson ed. 1983).

a potential candidate for a Structural Adjustment Loan.[37] The member country in this letter describes the economic development policies it wishes to pursue in order to overcome the structural problems facing its economy. The development policies need not be stated in chronological order, and do not need to be in a single document. The development policies need only to be identified.

Thus, the Letter of Development Policies may contain a number of paragraphs that deal with the past state of the economy, development problems facing the economy, the development objectives of the government, and the special circumstances leading up to the request.

The Letter of Development Policies, forwarded by the member state, requesting a drawing under a Structural Adjustment Loan, has to be scrutinized by the Bank and given a response, either positive or negative, by the Executive Directors, the appropriate organ for the approval of a request. The approval of the request and the grant of the loan take the form of a loan agreement, which is universally considered as an international contractual agreement. The participating members have full international juridical personality and they have not only the capacity but also the intention to be bound by certain legal relations between them.

The Letter of Development Policies betrays a more formalized nature in comparison with the Letter of Intent in the case of the Fund. This letter leads to a loan agreement. The Letter of Intent leads to a stand-by arrangement that is not considered either by the beneficiary or the issuer as a contractual agreement. Thus, the Letter of Development Policies could be construed as an offer on the part of the member country to the Bank, and the loan agreement as a counter-offer or as an acceptance on the part of the Bank. The offer is contained in the Letter of Development Policies and the acceptance is contained in the loan agreement.

The member country requesting a Structural Adjustment Loan offers to the Bank an economic development program that indicates a willingness to comply on the part of the requesting country with the "core obligations" adopted by the Bank. The Bank approves the request and grants the loan in the form of an agreement that indicates the willingness of the Bank to accept the conditions undertaken by the member.

This mechanism bears a striking similarity to an exchange of notes. That the loan agreement could be construed as a type of international agreement that takes the form of an exchange of notes is an argument that can be supported.[38] The crux of the analysis concerns not the legal character of the loan agreement, but

37. A. Bredimas, Aspects légales des Banques Internationales de Development, (Ph.D. thesis, University of Paris, Sorbonne, Faculty of Laws, Paris I, 1978).

38. That the "Exchange of Notes" constitutes international agreement, there is no doubt. *See* R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 257 (1963); *see also* Meyer, *The Names and Scope of Treaties*, 51, AM. J. INT'L L. 574, 590 (1957).

the legal character of the Letter of Development Policies signed by the requesting country and forwarded to the Bank for consideration.

A. Legal Analysis

1. *The Letter of Development Policies*

The Letter of Development Policies undoubtedly contains undertakings that could be considered as noncontractual. Nevertheless, in the context of the agreement as a whole, and in the context of the mechanics of an exchange of notes, the undertakings, even if they do not exhibit promissory language, could be regarded as contractual.

By submitting a request for a Structural Adjustment Loan, the member unhesitatingly indicates an intention to be bound, because the request leads to the approval of the Structural Adjustment Loan, which is contemplated as a contractual agreement. Thus, there is no apparent negotiation on the part of the member of an intention to contract. Its willingness to enter into a contractual agreement with the Bank is apparent in its demand for a loan.[39]

It could be argued, in other words, that the conditionality contained in the Letter of Development Policies becomes binding either because it is part of a bilateral agreement or because it is accepted unilaterally by the member country concerned. This letter constitutes a declaration of the member country on the proposed policies to be pursued. It has a quite important role because it initiates an arrangement that is unanimously regarded as an international contractual agreement. The letter, even if it does not refer explicitly to any contractual undertakings, exhibits an intention to be bound under the conditions of a loan agreement. The member makes an offer that is contained in the letter. The offer is a fact that starts the procedure for a loan. The initiative is taken by the country, and the request is made by the member, as contained in the letter. The Bank cannot initiate a contractual agreement by a unilateral decision. The member must make the request and the Bank agree to it.[40]

Thus, there is a request for a loan, an intention of the member to enter into a contractual agreement with the Bank. This intention is concluded from the general tenor of the letter. The Letter of Development Policies could be contemplated as a unilateral statement of the member to be bound under the terms of a loan accorded by the Bank.

The loan is certainly a contractual agreement. It comes (a) in response to the member's willingness to be bound under this agreement and to make use of the Bank's resources (offer) and (b) in response to the Bank's willingness (acceptance) to approve the use of its resources on the basis of this unilateral statement

39. V. Van Themaat, The Changing Structure of International Economic Law 123 (1981).

40. I. Detter, Law Making by International Organizations 176 (1965); E. Stern, *supra* note 36, at 99.

of intention. We have here an offer and an acceptance. The acceptance leads to a contractual agreement between two entities with full international juridical personality, and this agreement is produced by the exchange of signatures and documents that, normally, constitute and evidence a contractual agreement in international law.

Two points must be made here. The first is that the Letter of Development Policies constitutes a unilateral declaration of intent, which is produced through tough negotiations between the member country and the Bank staff mission. Thus, it could be contemplated as a negotiated arrangement in which the important elements of the preformulated arrangement (the loan) have been agreed. The second point is that this unilateral declaration of intention is explicitly referred to in the loan agreement. The loan agreement is a contractual agreement requiring approval under the country's law. The member country is under a legal obligation to pursue the policies set forth in the loan agreement and indirectly in the Letter of Development Policies that is referred to in the bilateral agreement (the loan). The member's failure to do so could be construed as a breach of an international agreement.

For the above-mentioned reasons, it could be argued that the Letter of Development Policies constitutes a unilateral declaration of intent with a binding or quasi-binding character. The letter exhibits an intention of the member to be bound under the terms of a bilateral agreement. This intention is illustrated in the undertakings contained in the letter. The loan agreement makes explicit reference to the letter and to the undertakings, even if they are not characterized as qualified, promissory, or contractual. Further, the member's negation of an intention to contract upon the materials in the letter, if it can be discerned at all, does not prove that the member does not have any requisite intention to make a binding unilateral declaration.

Thus there is an apparent intention on the part of the government requesting a Structural Adjustment Loan, to be bound upon the terms of the letter. The letter, consequently, constitutes a unilateral statement of intention with a binding or quasi-binding legal character. The question that is still unanswered is whether the precondition is a binding clause for the member country and what is the legal character of this obligation.

2. *The Character of the Precondition*

The Letter of Development Policies submitted to the Bank contains policies and objectives, proposed by the member, in order to persuade the Bank that it wishes to comply with the core obligations demanded for a Structural Adjustment Loan Agreement. This letter unambiguously contains economic measures that could also be demanded by the Fund in a stand-by arrangement. Balance of payments problems are part of development problems. Any measures aiming at the solution of balance of payments problems undoubtedly pave the way for appropriate investment programs. Thus, the reason why some officials claim that

a "grey conditionality" zone has been created in the framework of IMF-World Bank cooperation does not seem groundless.[41] While demand management and financial stability have been the primary objectives of Fund policies, these factors constitute the sine qua non for a potential development program.[42] A stand-by arrangement for the Fund, even if it does not contribute directly to the longer-term objectives of development of the member country concerned, unambiguously enables the member to plan its development policies with greater confidence.[43]

The Letter of Development Policies forwarded by the member country to the Bank refers to the economic measures the member is "persuaded" to take in order to be entitled to a drawing under a Structural Adjustment Loan. These measures overlap in some parts with the measures that could be taken under a stand-by arrangement, stabilization program. The member, if it wants to influence the decision of the Bank in favor of its application, may imply or may explicitly state that it intends to implement, or has already implemented, an economic program supported by the Fund under a stand-by or extended arrangement scheme. The question that arises is whether this undertaking constitutes an obligatory undertaking, or whether it could be considered as a moral obligation only. In other words, does the precondition in Case 3 constitute an undertaking for a member, with the same degree of enforceability that any other undertaking included in the Letter of Development Policies may have, or is it simply a wish of the member that a stand-by arrangement may be implemented, an indication of its willingness to comply with the Bank's "admonitions"?

The Bank expects the precondition to be implemented if the member wishes to make a drawing under a Structural Adjustment Loan. The member is entitled to refuse to comply with the Bank's instructions by signifying its unwillingness to proceed with the request. The Bank's expectation is contingent upon the member's making a request for a Structural Adjustment Loan. If the member, by signifying its unwillingness to proceed with the request, withdraws its application, no expectation will arise on the part of the Bank. If the grounds upon which the member is questioning the precondition are legitimate, then again it is entitled not to implement the precondition. If, however, a member wishes to proceed with the request, lodges a request, and yet refuses to implement the preconditions for no apparent reason, the question arises whether the Bank is obliged to consider the request de novo.

In this case, the issue is rather academic, because the Bank is entitled to challenge the member's request as being inconsistent with the Articles of

41. Corrado Pirzio-Biroli, at 126, 145–51.

42. Guitian, *Fund Conditionality and the International Adjustment Process*, FIN. & DEV., June 18, 1981, at 14.

43. Gold, *supra* note 15, at 292.

Agreement. Specifically, the Bank is entitled to challenge the request on the ground that the precondition was imposed in accordance with article I of its Articles of Agreement. If the Bank does not examine the application carefully so as to be consistent with the provisions of the Articles of Agreement, it will have contravened the provisions of article I by failing to ensure that the use of its resources is proper and fulfills the purposes for which it was established; it will have acted *ultra vires* to the Articles of Agreement.

Thus, the member has two options: either to accept the precondition and proceed with the request, or to reject the precondition and withdraw its application. Once the request is withdrawn or declined, the wish on the part of the Bank to see the precondition implemented becomes inoperative. Furthermore, this type of precondition does not fall, *stricto sensu*, into the ambit of the Bank's conditionality. The question arises whether the precondition is devoid of any binding character or whether it could be considered a binding obligation that stems from some other source of enforceability in international law.

Let me examine the first option, in which the precondition is explicitly referred to in the Letter of Development Policies. We have seen that this letter could be construed as a unilateral statement of intention with binding or quasi-binding character.[44] The Letter of Development Policies suggests an intent to be bound.

First of all, it is addressed to the Bank for a loan agreement. The Bank's intention to contract, through a loan agreement, is apparent. The Bank through this bilateral agreement (the loan) wishes the member to undertake obligations to observe the objectives and policy stated in the Letter of Development Policies and this letter is referred to, explicitly, in the loan agreement. The Bank responds to this letter with a loan agreement that is a contractual agreement in international law; the Bank's "acceptance" of the "offer," which is in the letter, takes the form of an international contractual agreement. The intention of the Bank to contract is apparent. The letter leads to an agreement. Thus the intention of the member to contract is given.[45] The member's willingness to implement the stabilization program under a stand-by arrangement scheme, however, cannot be considered as an undertaking with the same degree of enforceability that other undertakings included in the Letter of Development Policies may have.

Thus, even if it could be argued that the precondition is binding in the context of a unilateral binding declaration,[46] this argument does not sufficiently meet this point. The member's "obligation" to implement the precondition must be grounded on other sources or general principles of international law. It could be grounded on the general principle of good faith. A refusal of the member country requesting a Structural Adjustment Loan to implement a stabilization

44. Nuclear Tests Case (Austl. v. Fr.), 1974 I.C.J 267 (Judgment of Dec. 20).
45. *Id.*; Sicault, *supra* note 18, at 665.
46. *See generally* Carbone, *supra* note 18, at 166; Frank, *supra* note 18, at 612.

program supported by a stand-by arrangement from the Fund would constitute bad faith.

Nothing in the Bank's Articles of Agreement, per se, excludes the imposition of the precondition. Nothing could characterize the imposition of this type of precondition as improper. On the contrary, article V, paragraph 8(b), requires the Bank to "give consideration" to the views and recommendations of the Fund, although it cannot be deduced that the Bank is bound by anything the Fund may say or do.

The precondition, in our case, aims at the correction of the balance of payments problem. This precondition is expected to be adopted in advance, before the request appears for approval by the Executive Directors of the Bank. The Bank mission is convinced that the precondition is necessary to enable the member to adopt and carry out an economic development program supported by a Structural Adjustment Loan. The precondition is not generally incorporated in the Letter of Development Policies or in the loan agreement. In few, if any, cases is the precondition explicitly stated as a specific condition in the loan covenant. Sometimes the precondition is incorporated in the Letter of Development Policies, but in the majority of cases the intention of the member to implement the precondition is simply implied by the general tenor of the letter.

The precondition, if it is incorporated in the Letter of Development Policies, cannot be considered as an actual undertaking, in the context of a unilateral binding or quasi-binding statement of intention for the following reasons:

(a) The member's intention to implement a stabilization program supported by a stand-by or similar arrangement from the Fund is merely a descriptive expression of a course of conduct. It cannot be contemplated as a promissory, binding obligation. Given the circumstances in which the intention is tendered, however, particularly the fact that it is addressed "bilaterally"—specifically to another entity—means that it is not devoid of consequences. First, there is an obligation that the intention stated is actually contemplated at the time of its being expressed and that there are reasonable grounds for holding that intention.[47] If this were not the case, then the state concerned would be considered to be tendering a misrepresentation. This could amount to a breach of an obligation of good faith.

(b) The precondition does not fall, *stricto sensu,* into the ambit of the Bank's conditionality. The Bank is not authorized to initiate binding norms divorced from the use of its resources. This type of precondition cannot be contemplated as aiming at the proper use of the Bank's resources. It cannot be considered an undertaking derived from the binding or quasi-binding character of the unilateral statement of intent. Thus, the member country's failure to implement the

47. *See, e.g.,* Edgington v. Fitzmaurice, [1885] 29 Ch. D. 459, 483, Eng. (C.A., Bowen L.J.) ("the state of a man's mind is as much a fact as the state of his digestion").

precondition could constitute only bad faith and therefore breach of the general duty by the country to act in good faith.[48]

A subject of international law—in our case a member country requesting a loan from the Bank—that communicates its intent to others is bound to accept the legal implications of such a unilateral act; if it does otherwise, it breaks the rule on the binding character of communicated unilateral acts.[49] The second point that has to be scrutinized is the case where the precondition is not included in the Letter of Development Policies. In this case, the member country is "obliged" to implement the precondition on the ground of its general duty to act in good faith.

A stand-by or similar arrangement is considered by the Bank as a necessary measure for the successful implementation of an economic development program support by the Bank under a Structural Adjustment Lending. Recent practice has shown that the intensified collaboration between the Fund and the Bank has already produced effects. In Chile, Colombia, Costa Rica, Ivory Coast, Ecuador, Ghana, India, Madagascar, Turkey, Uruguay, Zaire, and in many other countries, Fund stand-by or extended arrangements were followed by World Bank Structural Adjustment Loans.[50] The Fund is not a development institution. The Extended Fund Facility and the long-term maturity credits disbursed recently by the IMF could, however, be characterized as development credits.[51]

The Bank's expectation that the member will implement a stabilization program, supported by the Fund under a stand-by or similar arrangement scheme, arises with the request for a Structural Adjustment Loan. In this request, the member indicates how it intends to conduct its development policies in the future. The statements, incorporated in the Letter of Development Policies, must betray the frank intention of the member to undertake a sufficient economic program in order to overcome its structural deficit problems. The member country concerned has an obligation to tender frank intentions regarding measures that have to be taken. The measures that fall into the ambit of the precondition, as is contemplated in Case 3, must constitute the essential background for the success of the development program. The member's obligation to accept the precondition and proceed to its implementation is grounded on its intention to overcome its economic problems. The precondition formulates the background against which the grant is to be made. Any deviation from the intention of the member to solve its

48. *See* B. CHENG, *supra* note 18; 1 G. SCHWARZENBERGER, *supra* note 18 (see index under estoppel).

49. Schwarzenberger, *The Fundamental Principles of International Law,* 87 RECUEIL DES COURS 312 (1955).

50. *See* IMF SURV. 166 (Feb. 6, 1986) (June 2, 1986).

51. *See* M. MILIVOJEVIC, THE DEBT RESCHEDULING PROCESS.

economic problem could be regarded as inconsistent with the general duty in international law to act in good faith. The country, thus, is estopped from acting otherwise.

IV. "Formal" Cross-Conditionality

A. The Extent and the Nature of "Formal" Cross-Conditionality

Informal cross-conditionality is the rule rather than the exception. In practice, the formal veto is a rare phenomenon. In the majority of cases, one of the Bretton Woods institutions succeeds in preventing or delaying a loan without any formal action being taken, or any formal veto being imposed.

As far as I know, only one case involving such an explicitly stated formal veto has come before either of the Executive Boards. In this case, the respective Executive Board decided that the loan had to be held up until compliance and implementation of the requisite cross-condition had been secured. Thus, in a very overt way the respective Executive Board is made officially aware of the existence of a cross-condition and its decision is made upon this event. In this there is a specific condition in the loan agreement of the Bank, tying the grant of a Structural Adjustment Loan to the implementation of a stabilization program supported by the Fund under a stand-by or similar arrangement.

The crux of this phenomenon is based on the legal sense of the term "tying" used in the loan covenant. The term "tying" must be the legal link that constitutes an agreement with the Fund, the sine qua non contemplated as a material legal condition for the grant of a Structural Adjustment Loan.

Formal cross-conditionality has three preconditions:

(a) The first condition is that the decision, or generally the consideration of the request for the grant of a Structural Adjustment Loan, has to be made by the Executive Board of the Bank when officially aware of the existence of such a "cross-insurance clause."

(b) The second condition is that the clause has to be incorporated in the loan agreement in a formal way so as to act as a "tying cog" between the provision and the execution of the main agreement.

(c) The third condition is that the provision must explicitly refer to the conclusion of an agreement between the government requesting a Structural Adjustment Loan and the Fund under a "lending" scheme through a stand-by or similar arrangement. In the case of no such condition explicitly referring to the conclusion of such an agreement, but simply mentioning the necessity of an endorsement by the Fund of the structural changes envisaged under a Structural Adjustment Loan program, then there is no formal cross-conditionality.

The third point could be supported by the argument that direct "formal" cross-conditional clauses in international banking law presuppose the existence of two agreements, which both grant a request for loans. In the event that the

provision does not, explicitly, specify any such "borrowing" arrangement from the Fund, then this could be classified as indirect "formal" cross-conditionality.

Sidney Dell in his definition includes this case as an explicit form of "formal" cross-conditionality without specifying whether it is a direct or an indirect form.[52] In my opinion, this does not constitute a direct "formal" cross-conditionality. It could be contemplated as indirect "formal" cross-conditionality, because a formal understanding or a formal decision that incorporates the clause of the concurrence/endorsement of the other Bretton Woods institution as a sine qua non is not similar to the case where the member is subject to a *formal veto over a loan against a drawing* by the other or *over a drawing against an existing loan.*

Thus, as far as "formal" cross-conditionality is concerned, we can discern two forms. The first form contains the formal legal tie in which the Bank relies on the Fund's approval of a stand-by similar arrangement and vice versa. The second form contains the formal legal tie in which the Bank relies on the Fund's concurrence/endorsement of the structural changes envisaged under an economic program supported by a Bank program loan and vice versa. The first form, unambiguously, could be nominated as direct "formal" cross-conditionality. The second form could be termed as indirect "formal" cross-conditionality. In both cases, the expressed conditions could be envisaged as cross-default provisions, similar to those operating in international private banking law. If we accept this argument, axiomatically we will not reject the point that direct "formal" cross-conditionality cited from the World Bank's approach operates only in sub-case 1 and not in both sub-cases; and that indirect "formal" cross-conditionality cited from the IMF's approach operates only in sub-case 2. This point needs further scrutiny.

A direct "formal" cross-conditionality enables one Bretton Woods institution to impose a "formal" veto over a loan against a drawing or over a drawing against a loan. This, cited from the World Bank's approach, could be interpreted as a "formal" veto over a loan against a drawing from the Fund (Case 3). The other way around, that is to say, direct "formal" cross-conditionality, cited from the Fund's approach, cannot be accepted because in cases of this form, the formal veto is imposed by the Fund's Executive Board over a drawing against an endorsement/concurrence of the Bank, upon the structural changes envisaged under the program supported usually by an Extended Fund Facility (Case 1). Even in the case of a formal veto imposed by the Fund, it cannot be contemplated as a direct "formal" cross-conditionality, because the cross-default provisions do not refer to "borrowing" arrangements from both Bretton Woods institutions. Thus, direct "formal" cross-conditionality can be cited from the World Bank's approach only; indirect "formal" cross-conditionality can be cited from the

52. S. Dell, *supra* note 6.

Bank or from the Fund. This argument could be supported by the fact that balance of payments disequilibrium is the first step towards an ambitious development program and not the other way around.[53]

B. The Legal Character of Formal Cross-Conditionality

Gold accepts that "formal" cross-conditionality is not only improper but also nonexistent.[54] The same point is reiterated by Stephen Silard.[55]

Let me elaborate on this point. In Case 1, if the member fails to comply with the "admonitions" of the Decision, so as to obtain the approval of the Bank, it breaches a contractual agreement. This act does not characterize the member as a lawbreaker in international law, however, for the following reasons:

(a) The member is not "obliged" to comply with the precondition incorporated in a stand-by or similar arrangement.

(b) This breach does not constitute a breach of an international agreement. The stand-by or similar arrangement is considered by the writer as an international contractual agreement of adhesion. The member, thus, is not a lawbreaker, but is a breaker of Fund law and an international personality acting in bad faith.

The same argument could be applied in the case of an indirect "formal" cross-conditionality cited from the World Bank's approach. In this case, however, the member acts not only in bad faith, but also commits a breach of an international agreement, because it does not comply with a specific provision incorporated in the loan covenant, which umambiguously constitutes an international contractual agreement. Thus, the member here is apparently a lawbreaker in international law, because the specific clause acting as a cross-condition has a binding, normative, obligatory sense. The member undertakes, through the loan agreement, an actual, specifically stated, obligation and if it does not comply with this obligation it is a lawbreaker in international law.

Apart from the theoretical point of view, however, this case has not occurred in practice as far as I know although I will not be surprised by such a phenomenon, operating in current financial transactions. What is left now is the phenomenon of direct "formal" cross-conditionality arising from the World Bank's approach.

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53. *The Critical but Elusive Relationship Between Adjustment and Economic Growth*, 14 Fin. & Dev. 7 (1977); Hino, *IMF-World Bank Collaboration*, Fin. & Dev., Sept. 23, 1986, at 10; *Managing Director, supra* note 34; Mookerjee, *Financial Stability and Planning*, Fin. & Dev., Mar. 9, 1972, at 2; Silard, *The Role of the International Monetary Fund*, 32, Am. U.L.R. 100 (1982–83); *Stabilization and World Bank*, 12 World Dev. 165 (Feb. 1984); *Towards a New Bretton Woods: The Grey Area Between Development and Balance of Payments Finance*, 18 Commonwealth Economic Papers 228.

54. J. Gold, Order in International Finance, The Promotion of IMF Stand-by Arrangements, and the Drafting of Private Loan Agreements 9, 16 (IMF Pamphlet Series No. 39, 1982).

55. Silard, *supra* note 53, at 101.

In the case of a loan agreement with Jamaica, approved December 13, 1977,[56] there was a specific covenant in the loan agreement *tying* the World Bank's disbursement to the ability of Jamaica to purchase stated amounts under stand-by arrangements with the IMF.[57] In this case, the condition is specifically stated as an explicit provision in the loan agreement, and the cross-default clause acts as a legal tie between the Bank's loan and the member's willingness to draw from the Fund under a stand-by arrangement. This case betrays the intention of the Bank to impose a formal veto over a loan against a drawing from the Bank. Apparently, this case constitutes a direct "formal" cross-conditionality, and the member, if it does not follow the provisions of the agreement, is considered a lawbreaker in international law.

Nevertheless, the following argument could be raised at this juncture. The term "cross-conditionality" is of relatively recent vintage. It is quite possible that in 1977 there had not yet been any such pronouncement. The General Counsel to the Bank thus ought to have pointed out to the President and the Executive Board that while the World Bank is required "to give consideration" to the views and recommendations of the IMF, the Bank is not authorized to surrender the power of decision on the use of its resources to any other institution. Tying World Bank disbursements to compliance by Jamaica with a stand-by arrangement with the IMF would appear to constitute a surrender of the power of decision. Thus, in this case, it would seem that the Bank has acted *ultra vires* to its Articles of Agreement, especially article V(8)(b).

V. Conclusion

In conclusion, although the Interim and Development Committees have made clear that cross-conditionality, however one defines this term, has been persistently avoided in the financial transactions by both institutions, there is evidence that there are cases where "informal" cross-conditionality has occurred in the sense of a veto by one of the Bretton Woods institutions over a loan by the other. Rarely has a case of "formal" cross-conditionality reached the Executive Board of either institution. On the other hand, there appear to have been many cases of "informal" cross-conditionality where each of the Bretton Woods institutions has withheld loans to a member country or has suspended a borrower's access to an existing loan, without any formal decision being taken or any formal veto being cast.[58]

56. *See supra* note 10.

57. Edwards, *An IMF Stand-by Arrangement*, 17 N.Y.U. J. INT'L LAW & POL. 521 (1984–85); T. HAYTER, AID, RHETORIC AND REALITY 49.

58. *See Proceedings of the Standing Committee on Foreign Affairs: Senate of Canada, Seventh Proceedings on Canada's Participation in the International Financial System and Institutions*, issue No. 8, at 0.8:16 (Apr. 15, 1985) (testimony by Mexican Finance Minister):

Direct "formal" cross-conditionality falls into the ambit of international law, whereas direct "informal" cross-conditionality falls into the ambit of general principles of international law. In the case of direct "formal" cross-conditionality the member is considered as a lawbreaker in international law if it does not follow strictly the provisions of the loan covenant. In the case of direct "informal" cross-conditionality, the member is considered an international personality acting in bad faith. Direct "formal" cross-conditionality is visible in the Bank's approach only. Indirect "formal" cross-conditionality is evident in both institutions' approaches. Indirect "informal" cross-conditionality is the regular practice from the collaboration between the two Bretton Woods institutions.

> The World Bank is establishing a new set of conditionality rules. Now, we have conditionality by the IMF, conditionality by the World Bank, and the process goes on. The bilateral agencies are also establishing their own conditionality. So after a while you end up with so many rules of conditionality and cross-conditionality that you give the government no leeway to decide a proper adjustment policy well adapted to their internal needs.

See also Federman, *The IMF and World Bank: Small Change for the Third World*, SOUTH, Nov. 1980; Hodd, *Africa, the IMF and the World Bank*, 86 AFR. AFF. J. ROYAL AFR. SOC. 331 (July 1987); Outtara, *Role of the (International Monetary) Fund in Africa*, IMF SURV. (June 1, 1987); Stewart, *Equipping the Fund and the Bank for the Long Haul*, BANKER, Sept. 1985; Wohlmuth, *IMF and World Bank Structural Adjustment Policies: Cooperation or Conflict?*, 5 INTERECON. 226 (Sept.–Oct. 1982); Wohlmuth, *supra* note 15, at 33; *World Bank and IMF Loan Policies to Africa*, 9 MOD. AFR. 3 (1985).